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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 UNITED STATES OF AMERICA, } Case No. 14CR0502-H
11 } Plaintiff,
12 } MOTION TO SUPPRESS
13 FRANCISCO GUTIERREZ, } v.
14 } Defendant.
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17 Defendant Francisco Gutierrez is charged with being a felon in possession of a
18 firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). Defendant Gutierrez
19 filed a motion to suppress evidence based on a warrantless search of 795 W. Fallbrook
20 Street, Apartment #18, Fallbrook, California (“Apartment #18”). (Doc. No. 35.) On
21 April 28, 2015, the Court held an evidentiary hearing on the motion to suppress
22 evidence. Attorney Tara McGrath appeared for the United States. Attorney Ezekiel
23 Cortez appeared for Defendant Gutierrez.

24 The Fourth Amendment protects “[t]he right of the people to be secure in their
25 persons, houses, papers, and effects, against unreasonable searches and seizures.”
26 U.S. Const., Amdt. 4. “[T]he ultimate touchstone of the Fourth Amendment is
27 ‘reasonableness.’” Brigham City v. Stuart, 547 U.S. 398, 403 (2006).
28 Reasonableness is defined “in objective terms by examining the totality of the

1 circumstances,” Ohio v. Robinette, 519 U.S. 33, 39 (1996), and by considering “the
 2 traditional protections against unreasonable searches and seizures afforded by the
 3 common law at the time of the framing,” Atwater v. Lago Vista, 532 U.S. 318, 326
 4 (2001) (internal quotation marks omitted). When traditional protections have not
 5 provided a definitive answer, precedents have “analyzed a search or seizure in light of
 6 traditional standards of reasonableness by assessing, on the one hand, the degree to
 7 which it intrudes upon an individual’s privacy and, on the other, the degree to which it
 8 is needed for the promotion of legitimate governmental interests.” Virginia v. Moore,
 9 553 U.S. 164, 171 (2008) (internal quotation marks omitted). Recognizing that the
 10 touchstone is reasonableness, not every search requires a warrant. Instead, “certain
 11 categories of permissible warrantless searches have long been recognized.”
Fernandez v. California, 134 S. Ct. 1126, 1132 (2014). Warrantless parole searches
 13 are lawful under certain circumstances. United States v. Grandberry, 730 F.3d 968,
 14 973 (9th Cir. 2013). The government argues the search was a lawful parole search.

15 “Police or parole officers may lawfully conduct searches of parolees or their
 16 residences without satisfying the Fourth Amendment’s warrant requirement when
 17 certain conditions are met.” Id. “One such condition is that the parolee is subject to a
 18 provision authorizing such warrantless searches.” Id. (citing United States v. Lopez,
 19 474 F.3d 1208, 1212–14 (9th Cir. 2007)). “A second such condition is that ‘[b]efore
 20 conducting a warrantless search’ of a residence ‘pursuant to a parolee’s parole
 21 condition, law enforcement officers must have probable cause to believe that the
 22 parolee is a resident of the house to be searched.’” Id. (quoting United States v.
 23 Howard, 447 F.3d 1257, 1262 (9th Cir. 2006)). “[P]robable cause as to residence
 24 exists if an officer of ‘reasonable caution’ would believe, ‘based on the totality of
 25 [the] circumstances,’ that the parolee lives at a particular residence.” Id. at 975
 26 (quoting United States v. Diaz, 491 F.3d 1074, 1077–78 (9th Cir. 2007); Howard, 447
 27 F.3d at 1262) (footnote omitted). “[T]his is a relatively stringent standard which
 28 requires more than a mere well-founded suspicion. . . . There must be strong evidence

1 that the parolee resides at the address.” Id. at 976 (internal quotations and citations
2 omitted). “[C]ertain patterns’ have ‘clearly emerge[d]’ in most cases in which
3 officers have probable cause to conclude that a parolee lived in a residence ‘not
4 reported by [the] parolee’ as his address.”” Id. (citing Howard, 447 F.3d at 1265).
5 “The patterns Howard enumerated were: (1) the parolee did not appear to be residing
6 at any address other than the one searched; (2) the officers had directly observed
7 something that gave them good reason to suspect that the parolee was using his
8 unreported residence as his home base; (3) the parolee had a key to the residence in
9 question; and (4) either the parolee’s co-resident or the parolee himself identified the
10 residence in question as that of the parolee.” Id. (citing Howard, 447 F.3d at 1265–
11 66) (quotations omitted). These factors are considered “cumulatively.” Id. “[T]he
12 determination of probable cause is based upon the totality of the circumstances known
13 to the officers at the time of the search.” Lacey v. Maricopa Cnty., 693 F.3d 896, 918
14 (9th Cir. 2012) (en banc).

15 The government established that Defendant Gutierrez was subject to conditions
16 of parole, including a fourth waiver. Government Exhibit 1. The California
17 Department of Corrections Notice of Conditions of Parole states: “You and your
18 residence and any property under your control may be searched without a warrant by
19 an agent of the Department of Corrections or any law enforcement officer.” Id.
20 Defendant Gutierrez signed the document in 2009 and the defense does not dispute the
21 accuracy of the document. Accordingly, Defendant Gutierrez was “subject to a
22 provision authorizing warrantless searches.” Grandberry, 730 F.3d at 973.

23 The Court next turns to whether, under the totality of the circumstances, law
24 enforcement reasonably believed that Defendant Gutierrez resided in Apartment #18
25 before starting the warrantless search. See id. at 975. David Pittman, a parole agent
26 with the California Department of Corrections at the relevant time, testified regarding
27 his work with the North County Gang Task Force to identify and apprehend parolees
28 that had violated parole. At the hearing, David Pittman testified that Francisco

1 Gutierrez was subject to an arrest warrant issued for violation of his parole in
2 approximately late 2009. Based on the arrest warrant, Pittman was assigned the task
3 to locate Defendant. He first determined that Defendant was subject to conditions of
4 parole, including a fourth waiver. Government Exhibit 1. Pittman opened an
5 investigation in 2009 and located Defendant Gutierrez in March 2010 based on a
6 phone associated with Defendant. He obtained a search warrant for a trap/trace of
7 Defendant's phone. Pittman developed information that the phone was pinging at 795
8 W. Fallbrook, Apartment #18. Based on the geo-location of the pings from the phone,
9 Pittman testified that the cell phone placed Defendant Gutierrez in Apartment #18.

10 Law enforcement surveilled the apartment but did not initially see Defendant at
11 Apartment #18. But on April 1, 2010, law enforcement saw a Hispanic male and
12 female leave Apartment #18 at approximately 7:30 a.m. and go to Apartment #14.
13 They exited Apartment #14 with three children, got into a car, and drove to a daycare
14 center. The female dropped two of the children off at daycare and the agents then
15 stopped the individuals.

16 Officers arrested Defendant. Initially, he gave a false name and said he was
17 living on the street. When Violetta Toro ("Toro") came back from the daycare center,
18 she was questioned. She said Toro and Defendant were living at Apartment #18 and
19 the officers should know that because they had been watching the apartment. Toro
20 also provided law enforcement a set of keys for the apartment. Based on the totality of
21 the circumstances, law enforcement entered Apartment #18.¹

22 In sum, law enforcement officers saw Defendant Gutierrez leave Apartment #18
23 in the early hours of the morning and take children to daycare. Defendant's cell phone
24 placed him in Apartment #18. Toro also identified Gutierrez as a co-resident of
25 Apartment #18, stated that they had been living in Apartment #18 for several months,

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27 ¹ Among other things, bills and mail for Toro and Defendant and a pay stub for
28 Defendant established dominion and control. But this after-acquired evidence does
not establish probable cause.

1 and provided law enforcement with a set of keys to Apartment #18. Moreover, Toro
2 identified the apartment as their place. Based on the totality of the circumstances
3 known to law enforcement at the time of the search, law enforcement reasonably
4 believed that Gutierrez resided in Apartment 18. Grandberry, 730 F.3d at 976. In
5 light of the fact that Defendant Gutierrez signed a fourth waiver, law enforcement
6 conducted a valid parole search. Id. at 973. On cross, the defense questioned why the
7 surveillance did not show Defendant at Apartment #18 until April 1, 2010 if
8 Defendant was living there. But Toro stated that they knew law enforcement was
9 watching the apartment and Defendant may have elected to not appear outside the
10 apartment while being watched. Accordingly, the Court denies Defendant Gutierrez's
11 motion to suppress the evidence.

12 IT IS SO ORDERED.
13 DATED: April 28, 2015


14 HONORABLE MARILYN L. HUFF
15 UNITED STATES DISTRICT JUDGE
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